2010

Carolina Bless v. Luis Aguilera : Brief of Appellee

Utah Court of Appeals

Ron D. Wilkinson; Nathan S. Shill; Counsel for Appellee.
Luis Aguilera; Appellant Pro Se.

Case No. 20100334

IN THE

UTAH COURT OF APPEALS

CAROLINA BLESS,
Petitioner/Appellee,

vs.

LUIS AGUILERA,
Respondent/Appellant

Brief of Appellee

APPEAL FROM THE FOURTH DISTRICT COURT, AMERICAN FORK, STATE OF UTAH

RON D. WILKINSON (5558)
NATHAN S. SHILL (11961)
Heritage Law Offices
815 East 800 South
Orem, UT 84097
Telephone: (801) 225-604

Counsel for Appellee

LUIS AGUILERA
8043 North Ridge Loop East, J6
Eagle Mountain, Utah 84005

Appellant/Pro Se

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8043 North Ridge Loop East, J6
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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Annotated § 78A-4-103(2)(c) (West 2008).

STATEMENT OF THE ISSUES

1. Did the trial court clearly err when it found that the funds in the Appellant's bank account were not exempted funds under Utah Law and were subject to garnishment?

Standard of Review: This Court reviews the correctness of the trial court's findings of fact for clear error. Utah Rule of Civil Procedure 52(a) provides that "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness."

2. Did the trial court improperly allow the garnishment of the Appellant's other property when his income was garnished to the maximum amount allowed by law?

Standard of Review: In considering a review of a mixed question of law and fact, the Court "considers multiple factors when determining how much deference to grant a district court's application of law to facts." *Searle v. Milburn Irrigation Co.*, 2006 UT App. 16, ¶ 16, 133 P.3d 382 (citing *Jeff v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998)). In determining the amount of discretion, the Court considers three (3) factors: 1) the complexity and variation of the facts; 2) district court's observations of witness demeanor and credibility versus the adequacy of the record; and 3) policy reasons. *State v. Levin*, 2006 UT 50, ¶ 3, 144 P.3d 1096.

STATUTORY PROVISIONS AND RULES

This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j). The statutes and rules pertinent to this appeal are Utah Code Ann. § 78B-5-505, Utah Code. Ann. § 30-3-3. Utah Rules of Civil Procedure 64 and 64D, and Utah Rules of Appellate Procedure 24 and 33. The text of these provisions is included in the Addendum.

STATEMENT OF THE CASE

Luis Aguilera (hereinafter Mr. Aguilera) and Carolina Bless (hereinafter Ms. Bless) were divorced pursuant to a Decree of Divorce entered on June 19,

2003. On June 8, 2005, Mr. Aguilera filed a Petition to Modify the parties' Decree of Divorce. After filing his Petition to Modify, this matter came before the trial court pursuant to multiple Orders to Show Cause which resulted in various stipulations of the parties.

Subsequent to the various stipulations, which were read into the record and confirmed by both parties on the record, Mr. Aguilera improperly[1] brought multiple motions such as a motion to dismiss the stipulation before the Court.

Ms. Bless requested her attorney fees and costs for having to respond to Mr. Aguilera's improper motions. On January 2, 2008, this matter came before the trial court and the court found that "[Ms. Bless] has prevailed on each of the issues put before the court and is therefore entitled to consider of costs and fees." *See* Findings of Fact, Conclusions of Law, and Order.

In addressing Ms. Bless' request for attorney fees the trial court noted that:

> "[Ms. Bless] is asking for attorneys fees due to a pattern of repeated motions and requests that have not been made according to the rules of procedure or that have otherwise lacked merit. Each motion, even though improperly brought or lacking in merit, necessitated a response by [Ms. Bless]. The court finds that [Mr. Aguilera's] opposition to the entry of the order reflecting a stipulation from a December 6, 2005 hearing was not brought in good faith, nor did a viable legal basis exist upon which a motion to dismiss could be brought. The attorney's fees accumulated in

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[1] The trial court confirmed that the above mentioned motions were improperly brought by Mr. Aguilera. *See* Findings of Fact, Conclusions of Law, and Order.

defending improper motions and requests place a financial burden upon [Ms. Bless]."

Based on the above-mentioned findings, the trial court awarded Ms. Bless a judgment for attorney fees in the amount of $4,600.00 that were incurred due to Mr. Aguilera's dilatory actions.

Despite the entry of the Court's judgment in January 2008, Mr. Aguilera had failed to make any payments on the judgment through December 2009, nearly two (2) years after the entry of the initial judgment. As such, in December 2009, Ms. Bless submitted a writ of garnishment to garnish funds from Mr. Aguilera's bank account. The writ of garnishment was properly served on Wells Fargo Bank on March 23, 2019.

On or about March 24, 2010, Mr. Aguilera filed a Request for Hearing on the writ of garnishment. Mr. Aguilera's request for hearing came before the Court on April 5, 2010. At hearing, Mr. Aguilera argued that the funds garnished from his bank account were: 1) student loan money and not subject to garnishment; 2) that his wages were currently being garnished at the maximum amount allowed at law and, thus, other garnishment of other property is not available to Ms. Bless; 3) that the funds in his bank account were unemployment benefits because he was going to be unemployed in a month and, thus, exempt property; and, 4) that the funds in his bank account were provisions and, thus,

exempt property. Mr. Aguilera indicated to the trial court that he had documents to support his claims, but did not present the documents to the trial.

The trial court made findings of fact that the funds in Mr. Aguilera's bank account were not student loans and not subject to any exemption. As such, the trial court released the garnished funds to Ms. Bless for satisfaction of the judgment entered by the trial court against Mr. Aguilera.

After the hearing, Mr. Aguilera improperly submitted documents to the trial court which allegedly supported his claims that the funds were student loans and/or exempt funds. Mr. Aguilera had not submitted the above-mentioned documentation to the trial court at the April 5, 2010 hearing. The trial court properly denied to reconsider its ruling entered at the prior hearing.

STATEMENT OF FACTS

On June 19, 2003, the parties' were divorced pursuant to a Decree of Divorce entered in the Fourth District Juvenile Court. On June 8, 2005, Mr. Aguilera filed a Petition to Modify the parties' Decree of Divorce. Through 2005, this matter came before this Court pursuant to multiple Orders to Show Cause initiated by Mr. Aguilera. At each hearing, the parties' entered into a stipulation that was: 1) read on the record; 2) both parties' were given the opportunity to supplement the stipulation; 3) both parties' were asked if they understood the

stipulation and agreed to be bound by the stipulation; and, 4) incorporated into an order of the court.

Despite agreeing to the above-mentioned stipulations on the record, in 2006 Mr. Aguilera began a pattern of submitting improper motions to the court in an attempt to set aside the stipulation. On January 2, 2008, the trial court indicated that "The majority of the activities [in the case] which occurred in 2006 arise from improperly brought motions such as the motion to dismiss, or arguments concerning the stipulation in December 2005 which this court believe need not have occurred." *See* Findings of Fact, Conclusions of Law, and Order (emphasis added).

Ms. Bless' request for attorney fees was granted by the trial court and a judgment of $4,600.00 was entered against Mr. Aguilera. The trial court awarded Ms. Bless' attorney fees "due to a pattern of repeated motions and requests that have not been made according to the rules of procedure or that have otherwise lacked merit." *Id.* The court found that each motion or request "even though improperly brought or lacking in merit, necessitated a response by [Ms. Bless]." *Id.* Finally, the trial court indicated that Mr. Aguilera's motions and requests were "not brought in good faith, nor did a viable legal basis exist upon which a motion to dismiss could be brought." *Id.* Ms. Bless was awarded a judgment of $4,600.00 for her attorney fees and costs. *Id.*

After the trial court entered its judgment for attorney fees, Mr. Aguilera then appealed the judgment. Subsequently, Mr. Aguilera dismissed his appeal and stipulated to the judgment.

Mr. Aguilera failed to make any payment towards the judgment entered by this Court. As such, in December 2009, Ms. Aguilera submitted a writ of garnishment to the trial court and properly served Wells Fargo Bank, the holder of Mr. Aguilera's property, in March 2010. Mr. Aguilera requested a hearing on the garnishment.

On April 5, 2010, Mr. Aguilera's opposition to the garnishment came before the court. Mr. Aguilera argued that the funds in his bank account were student loans and other exempt property. Mr. Aguilera also argued that the funds were not subject to garnishment, because his income was being garnished at the maximum amount allowed by law. The trial court rejected Mr. Aguilera's argument and determined that the funds were not exempt and that the garnishment was proper.

Consistent with Mr. Aguilera's previous history of bringing motions that are procedurally improper and without merit, Mr. Aguilera submitted additional documents after the hearing and requested another hearing. The trial court appropriately declined to set another hearing as the matter was previously decided on its merits.

SUMMARY OF THE ARGUMENT

Point I: This court should strike Mr. Aguilera's appellate brief for failing to comply with the procedural requirements of Rule 24 of the Utah Rules of Appellate Procedure. Mr. Aguilera's procedural deficiencies include the following: 1) failing to support the challenged findings with a transcript; 2) failing to provide a legally recognizable standard of review; 3) failing to cite the record indicating he preserved the issues; and, 4) failing to properly identify or to develop any analysis of the legal authority on which he bases his claim.

Point II: In support of his arguments, Mr. Aguilera submitted multiple pages of documents as new evidence. Mr. Aguilera's attempt to submit new evidence is not proper and the court should strike any new evidence.

Point III: This Court should uphold the trial court's factual findings in this because: 1) Mr. Aguilera did not marshal the evidence in support of the findings he changes; and 2) even if he had marshaled the evidence supporting the Court's findings, he is relying on evidence that was not presented at hearing on the garnishment.

Point IV: The trial court properly applied the relevant law and statutes to determine that the funds in Mr. Aguilera's bank account were not exempt.

Point V: This Court should award attorney fees to Ms. Bless for defending against this frivolous appeal and award attorney fees in defending the appeal as the attorney fees arose from enforcing a child custody determination.

ARGUMENT

This Court should affirm the trial court's findings of fact and conclusions of law as such were clearly within the court's discretion and supported by evidence presented at oral argument. Further, the Court should award fees and costs to Ms. Bless for having to spend the time and money needed to defend against this frivolous appeal that was necessary to collect fees that were incurred to defend a custody award.

I. MR. AGUILERA'S BRIEF FAILS TO COMPLY WITH PROCEDURAL REQUIREMENTS

Mr. Aguilera's brief fails to comply with the procedural requirements of Rule 24 of the Utah Rules of Appellate Procedure in several aspects. First, Mr. Aguilera failed to support challenged findings with a transcript of the hearing record. Second, Mr. Aguilera failed to provide any recognizable legal standard of review. Third, Mr. Aguilera failed to provide a citation to the record indicating that he preserved the issues on appeal. Finally, and most glaringly, Mr. Aguilera's failed to properly identify or to develop any analysis of the legal authority upon which he bases his claims. The Court should strike Mr.

Aguilera's brief on the basis of these deficiencies. In the alternative, the Court should only consider those portions of the brief that comply with the procedural requirements of Rule 24 of the Utah Rules of Appellate Procedure.

A. Mr. Aguilera fails to support challenged findings with transcript of the hearing.

Appellate Rule 11 provides:

> (e)(2) Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

Utah R. App. 11(e)(2).

Though Mr. Aguilera cites to the record of the hearing and makes general references to the record of the hearing in the trial court, the addendum does not contain the specific portions of the transcript disputed by Mr. Aguilera. If Mr. Aguilera wishes to dispute particular findings of fact at the trial court level, Mr. Aguilera must provide Ms. Bless with the relevant portions of the record in support of his assertions the trial court erred. As provided by the rule, neither Ms. Bless nor the court is required to "correct appellant's deficiencies in providing the relevant portions of the transcript." *Id.*

B. Mr. Aguilera's brief fails to comply with Rule 24 of the Utah Rules of Appellate Procedure

Appellate Rule 24 sets out the component parts of a proper appellate brief. Mr. Aguilera brief fails to comply with that rule in a number of respects. The Court may strike and disregard Mr. Aguilera's brief in total, Utah R. App. P. 24(k); *see Burton Lumber & Hardware Co.*, 2008 UT App. 207, n. 5, 186 P.3d 1012; *Burns v. Summerhays*, 927 P.2d 197,199 (Utah Ct. App. 1996). Alternatively, the court may disregard those portions of the brief that fail to comply with Rule 24 and to presume, instead, the correctness of the trial court's actions below. *See Koulis v. Standard Oil Co. of Cal.*, 764 P.2d 1182, 1185 (Utah 1987).

Applicable here, Rule 24 provides

> **(a) Brief of the appellant**. The brief of the appellant shall contain under appropriate headings and in the order indicated:
> . . .
> (a)(5)A statement of the issues presented for review, including each issue: the standard of appellate review with supporting authority; and
> (a)(5)(A) citation to the record showing that the issue was preserved in the trial court;
> . . .
> (a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the fact relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings of below shall be supported by citations accordance with paragraph (e) of this rule.

Utah R. App. 24(a).

Furthermore, Utah law makes clarifies an adequate appellate brief goes beyond mere assertions and conclusory allegations. Rather, an adequate brief contains a thorough identification of the issues and thorough analysis of those issues, with citation to relevant authorities. *See State v. Lee*, 2006 UT 5, ¶ 22, 128 P.3d 1179; *Kramer v. State Retirement Bd.*, 2008 UT App. 351, ¶ 22, 195 P.3d 925.

Mr. Aguilera fails to comply with both the technical and substantive requirements of Rule 24 of the Utah Rules of Appellate Procedure for several reasons. First, Mr. Aguilera's brief does not provide a recognizable standard of review. Despite containing bolded sections labeled "Standard of review," Mr. Aguilera's brief does not contain a discernable standard of review. Aplt.'s Br. at pp. 1–2. Mr. Aguilera instead cites to various statutory provisions, presumably in support of his position. *Id.* It is unclear how the Court can determine standard of review from Mr. Aguilera's brief. The onus is on Mr. Aguilera to provide a standard of review for the issues on appeal.

Second, Mr. Aguilera fails to state whether he preserved the issues presented on appeal. Mr. Aguilera's citations to the hearing record in no way evidence that Appellant preserved the issues for appeal. Mr. Aguilera states:

> Furthermore, Respondent/Appellant had documentation on 4/5/2010 [sic] regarding employment, student loan, and Pell Grant; however, the trial court did not request to see evidence/documentation regarding the student loan and Pell Grant or the source of them at the time of the trial.

> The trial court also did not attempt to verify whether or not exemptions applied to student loans or Pell Grants.

Aplt.'s Br. At pp. 11-12.

Third, Mr. Aguilera fails to cite the record to demonstrate that he preserved the issues challenged on appeal. *See generally* Aplt.'s Br. The trial court had no affirmative duty to request dispositive documents or to prove Mr. Aguilera's case for him. Parties may produce evidence at hearings in support of their cases. Mr. Aguilera's failure to introduce documents is a failing of the Mr. Aguilera alone, not the judicial process. Merely stating, "Respondent/Appellant had documentation to verify the school loan and employment status" is insufficient to preserve the issue for appeal. Aplt.'s Br. at p. 8. At the hearing, Mr. Aguilera proffered no evidence as to the source of money found in his bank account. By so neglecting to introduce purportedly relevant documents, Mr. Aguilera failed to preserve the issues he raises on appeal.

Perhaps most glaringly, Mr. Aguilera failed to properly identify or to develop any analysis of the legal authority upon which he bases his claims. Mr. Aguilera merely points to sporadic provisions he believes supports his appeal, without also informing this Court of the legal basis for those claims.

The preceding reasons provide the Court with sufficient basis to strike and not consider Mr. Aguilera's brief. *See* Utah R. App. P. 24. Ms. Bless asks the

court to make a searching review of Mr. Aguilera's brief and strike it where appropriate. Elsewhere, the Court should limit its review to record facts Mr. Aguilera has appropriately cited and which are supported by reference to the trial court proceedings below. *See Koulis*, 746 P.2d at 1185. Additionally, the court should give credence only to those legal arguments which are accompanied by thoughtful analysis. *See Lee*, 2006 UT 5, *Kramer*, 2008 UT App. 351, ¶ 22.

II. MR. AGUILERA IMPROPERLY ATTEMPTS TO SUBMIT NEW EVIDENCE ON APPEAL

Utah appellate law provides that appellants may not introduce new evidence on appeal. *See State ex rel. L.M.*, 37 P.3d 1188 at fn. 3 (Utah App. 2001); *Otteson v. State*, 945 P.2d 170, 171 (Utah Ct. App. 1997) ("Appellate courts will not consider new evidence on appeal").

In his brief, Mr. Aguilera asserts he "communicated to the trial court that Respondent/Appellant had documentation to verify the school loan and employment status" and that "[t]he trial court did not request to review the documentation." Aplt.'s Brief at p. 8. Mr. Aguilera's brief contains a lengthy addendum section containing various documents not presented at the oral argument and, therefore, not found in the record. *See id.* at Addendum. Mr. Aguilera's own admission clearly establishes that he is attempting to introduce new evidence on appeal. The trial court had no duty to request the evidence. If

Mr. Aguilera wished the trial court to consider additional documents or evidence, the evidence should have been submitted at oral arguments.

Mr. Aguilera attempts to introduce new evidence on appeal not introduced at oral arguments. The Court should disregard the additional documents proffered in Mr. Aguilera's brief as improper new evidence.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS THAT THE GARNISHED FUNDS WERE NOT EXEMPT STUDENT LOANS, UNEMPLOYMENT BENEFITS, AND/OR PROVISIONS.

This Court should uphold the trial court's factual findings in this case for two reasons. First, because Mr. Aguilera did not marshal the evidence in support of the findings he changes. Second, because even if he had marshaled the evidence supporting the Court's findings, he is relying on evidence that was not presented at hearing on the garnishment.

A. This Court should reject Mr. Aguilera's allegations of factual error because he did not marshal the evidence in support of the trial court's findings.

Under Rule 24(a)(9) of the Utah Rules of Appellate Procedure, a "party challenging a fact finding must first marshal all record evidence that supports the challenged finding." In order to properly challenge factual findings such as these, the challenging party is required to marshal "all of the evidence supporting the findings and show that despite the supporting facts, and in light

of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶ 17, 164 P.3d 384 (*quoting Grace Drilling Co. v. Board of Review of Indus. Comm'n*, 776 P.2d 63, 68 (Utah Ct. App. 1989)). Thus, to fully comply with the requirement, the challenging party must "marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack." *State v. Larsen*, 2000 UT App 106, ¶ 11, 999 P.2d 1252 (internal quotations and citation omitted). Perhaps the best explanation of the marshaling requirement came from the Utah Court of Appeals itself when it stated;

> The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every crap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's findings resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311,1315 (Utah Ct. App. 1991) (emphasis in original).

One key purpose of the marshaling requirement is to "remind [] litigants and appellate courts of the broad deference owed to the fact finder at trial." *State*

v. Moore, 802 P.2d 732, 739 (Utah Ct. App. 1990). Further, the marshaling requirement is designed to ensure that the court is able to meaningfully review the sufficiency of the evidence upon which the court below relied and overturn only those factual determinations that lack the support of substantial evidence. *See Martinez v. Media-Paymaster Plus*, 2007 UT at ¶ 17. As one commentator noted, the marshaling requirement, which forces an appellant to "catalogue the evidence supporting the trial court's decision," ensures that appellants do not merely "try to persuade the appellate court that their theory of the cas was stronger than that which was advanced by the other side, or that their evidence and witnesses were more compelling;" but rather it ensures that "appellate review of a factual determination is strictly confined to an analysis of whether there was sufficient evidence to support the particular factual conclusions that was actually reached below." Ryan D. Tenney, *The Utah Marshaling Requirement An Overview*, Utah B. J. 22 (August/September 2004).

Utah courts have imposed the marshaling requirements on pro se appellants. *See Thomas v. Department of Workforce Services*, 2008 UT App 361 ¶ 1 (unreported) Addressing whether a pro se litigant must satisfy the marshaling requirement, this Court opined that "while 'this court generally is lenient with pro se litigants,' such parties must still comply with our rules." *Blosch v. Blosch*,

2005 UT App 281 ¶ 1 (unreported) (quoting *Lundahl v. Quinn*, 2003 UT 11, ¶ 4); *see also Maisbitt v. Fink*, 1999 UT App 129 ¶ 3 (unreported).

Utah's appellate courts have historically accepted the lower court's findings when the appellate fails to comply with the marshaling requirement. *See, e.g., State v. Earl*, 2004 UT App 163, ¶ 11, 92 P.3d 167. In *Martinez v. Media-Paymaster Plus*, 2007 UT 42, ¶¶ 16-21, 164 P.2d 384, the Utah Supreme Court held that while automatic affirmation may not be required in all cases, it is still a permissible sanction for a party who fails to properly marshal the evidence.

That sanction is appropriate here. This is not a case where an appellant largely complied with the marshaling requirement but then inadvertently omitted a few peripheral details. Rather, this is a case in which the party challenging the court's factual findings completely failed to marshal any evidence and instead merely provides the court with a restatement of his unsuccessful arguments from oral argument.

Given Mr. Aguilera's multiple marshaling failures, this Court should decline to address the merits of his sufficiency challenge.

B. Even if this Court addresses Mr. Aguilera's sufficiency challenge on its merits, this Court should still hold that there was sufficient evidence to support the trial court's findings.

Even if the Court determines that Mr. Aguilera's brief meets the lower level of marshaling required for pro se litigants, the Court should still affirm the

trial court's findings of fact because sufficient evidence was presented to overcome a challenge of clear error. A finding of fact is only "clearly erroneous" when it is "so lacking in support as to be against the clear weight of the evidence." *State ex rel. E. R.*, 2001 Ut App 66, ¶ 5, 21 P.3d 680.

There is sufficient evidence on the Record supporting the trial court's finding that the garnished funds were not student loan money, not unemployment benefits, and not provisions for family or individual use to overcome a challenge of "clear error."

First, the funds that were garnished from Mr. Aguilera were funds from his bank account with Wells Fargo Bank. *See* Writ of Garnishment. Mr. Aguilera made the argument on the record that the funds were student loan money received. Mr. Aguilera did not provide the Court any documentation of his allegations that the money was, in fact, student loans. In fact, Mr. Aguilera admits in his own appellate brief that he did not provide this documentation to the court at the time of oral argument because the trial court did not request it. Aplt.'s Br. at Pages 11-12. It is not the obligation of the trial court to inform Mr. Aguilera how to present his case. Furthermore, as discussed previously herein, it is not appropriate for the Court to rely on new evidence on appeal.

Second, in arguing that the funds were exempt property because they were unemployment benefits, Mr. Aguilera presented documentation to the Court that

he was going to become unemployed at the end of the month. *Id.* Mr. Aguilera's own statements on the record support the trial court's finding that the funds were not unemployment benefits. The court appropriately found that money placed in a bank account in anticipation of becoming unemployed, does not qualify as unemployment benefits.

Third, Mr. Aguilera argued on the record that the funds in his bank account were intended as provisions for family or individual use for the next twelve (12) months. In response, Ms. Bless argued that the funds were simply money in his bank account and did not qualify under the exemption. The court appropriately made a finding of fact that the funds were exempt not provisions. The court appropriately found that the funds were money in Mr. Aguilera's bank account and that he is not able to make it exempt by saying that he is going to use it for an exempt purpose at some point.

Therefore, this Court should affirm the trial court's factual findings that the garnished funds were not student loan money, not unemployment benefits, and not provisions for family or individual use for the next twelve (12) months. This Court should affirm the factual findings that the funds garnished were non-exempt property.

IV. EVEN IF THE COURT WERE TO CONSIDER MR. AGUILERA'S NEW EVIDENCE, THE NEW EVIDENCE DOES NOT ESTABLISH THAT THE GARNISHED FUNDS WERE EXEMPT PROPERTY.

In addition to rejecting Mr. Aguilera's claim that the trial court's findings of facts are in error, this Court should affirm the trial court's decision regarding the proper application of the various laws regarding application of exemptions.

A. Under Rule 64D of the Utah Rules of Civil Procedure, limitations on garnishment of income do not apply to garnishment of other property.

Rule 64D(a) of the Utah Rules of Civil Procedure provides that "A writ of garnishment is available to seize property of the defendant in the possession or under the control of a person other than the defendant." Rule 64D(a) of the Utah Rules of Civil Procedure also provides that the "disposable earnings of an individual subject to seizure is the lesser of: (a)(1) 50% of the defendant's disposable earnings for a writ to enforce payment of a judgment for failure to support dependent children or 25% of the defendant's disposable earnings for any other judgment; or; (a)(2) the amount by which the defendant's disposable earnings for a pay period exceeds the number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable."

Rule 64(a)(5) of the Utah Rules of Civil Procedure defines "disposable earnings" as "that part of earnings of an individual remaining after the deduction from those earnings of amounts required by law to be withheld." Said

definition is included in the section of the Utah Consumer Credit Code that relates to limitations on garnishment.

A writ of garnishment is available to seize any "property of the defendant in the possession or under the control of a person other than a defendant." Utah R. Civ. Pro., Rule 64D(a). The property available for a writ of garnishment includes property that is in the possession of another which includes disposable earnings; however, a writ of garnishment is not limited to disposable earnings. If the Utah Rules of Civil Procedure intended a writ of garnishment to be limited to only disposable earnings, it would have defined a writ of garnishment to include only disposable earnings. Instead, the Utah Rules of Civil Procedure provide for a writ of garnishment against property in control or possession of another. In fact, the forms on the Utah Courts website include forms for both garnishment of wages and garnishment of other property. Appellee properly submitted the forms to the Court for the writ of garnishment to collect from the Appellant's bank account, which is in control of Wells Fargo Bank. *See* Writ of Garnishment.

Appellant argues to this Court that if is disposable earnings are being garnished at the maximum percent, that other writs of garnishment are not available for other property, such as a bank account, that is in possession of another. Appellant ignores the plain language of Rule 64D of the Utah Rules of Civil Procedure that states that "garnishment is available to seize property of the

defendant in the possession or under the control of a person other than the defendant." Utah R. Civ. Pro., Rule 64D(a). Appellant further ignores the plain language of the statute that limitations on garnishment only apply to disposable earnings, not to other property in possession of under the control of another person.

Appellee appropriately filed for a writ of garnishment for funds in the Appellant's bank account and the Court appropriately allowed for those funds to be garnished from the Appellant's bank account.

B. Exemptions for unemployment do not apply to money in the appellant's bank account.

Utah Code Ann. § 78B-5-505 details the property that is exempt from execution or garnishment. Said exemptions include "benefits the individual or the individual's dependent have received or are entitled to receive from any source because of . . . unemployment." Utah Code Ann. § 78B-5-505(1)(a)(iii).

At hearing on April 5, 2010, Mr. Aguilera indicated that his employment would cease at the end of April 2010. Mr. Aguilera argued that because his employment would soon cease that the funds in his account were "unemployment" and exempt from execution.

The plain language of the statute is that unemployment benefits are not subject to a writ of garnishment. Mr. Aguilera is attempting to stretch this

language to allow him to claim that because he will soon be unemployed that money that is in his bank account is somehow converted into an unemployment benefit and, thus, exempt from garnishment. The plain language of the statute does not support Mr. Aguilera's claim.

C. Exemptions for provisions do not apply to the money in the Appellant's bank account.

Utah Code Ann. § 78B-5-505(viii)(C) provides that "provisions sufficient for 12 months actually provided for individual or family use." Conspicuously absent from the statute is a statement that money "for 12 months actually provided for individual or family use" is exempt from garnishment. Provisions are not defined in the statute. The Merriam-Webster dictionary defines provisions as "a stock of needed materials or supplies; especially: a stock of food." *See* Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/provisions.

Furthermore, in drafting Utah Code Ann. § 78B-5-505, the Utah legislature recognized the distinction between money and other property for example. Utah Code Ann. § 78B-5-505(1)(a)(1)(vi) provides that "money or property received, and rights to receive money or property for child support" are exempt. Utah Code Ann. § 78B-5-505(1)(a)(v)(vii). If the Utah legislature intended for a party

to set aside money for "12 months actually provided for individual or family use," it would have included that money or provisions could be set aside.

Mr. Aguilera is attempting to stretch the definition of provisions to include any money that he may use to purchase provisions. The plain language of the statute and the dictionary definition of provisions establish that the Court intended for the exclusion to include supplies of food, clothing, etc., not money set aside to allegedly purchase said items.

If the Court were to accept Mr. Aguilera's argument, it would severely limit the ability of any creditor to collect a judgment. For example, an individual could simply state that the money in his or her account is for food, clothing, etc. for the next twelve (12) months and avoid the garnishment. This creates an absurd result where a debtor would in every instance where a bank account was garnished, say that he or she was saving the money for support for the next twelve (12) months.

V. THIS COURT SHOULD AWARD ATTORNEY FEES TO MS. BLESS BECAUSE UNDER UTAH RULE OF CIVIL PROCEDURE MR. AGUILERA'S APPEAL IS FRIVILOUS UNDER UTAH RULE OF APPELLATE PROCEDURE 33.

Under Utah Rules of Appellate Procedure 24(a)(9), "a party seeking to recover attorney's fees on appeal shall state the request explicitly and set forth the legal basis for such an award."

This Court should award attorney's fees and costs to Ms. Bless as Mr. Aguilera's appeal falls under the definition of "frivolous" found in Utah Rule of Appellate Procedure 33. Under Rule 33, if the Court "determines that a motion made or appeal taken under these rules is . . . frivolous . . ., it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party."

Rule 33 further defines a "frivolous" appeal as one that is "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Although Utah courts may hesitate awarding fees for frivolous appeals, they have clearly concluded that an award of attorney's fees is proper when "an appeal is obviously without any merit and has been taken with no reasonable likelihood of prevailing, and results in . . . increased costs of litigation; and dissipation of the time and resources of the Law Court.' *Porco v. Porco*, 752 P.2d 365, 369 (Utah Ct. App. 1988), *quoting Auburn Harpswell Ass'n v. Day*, 438 A.2d 234, 239 (Me. 1981).

Mr. Aguilera's appeal satisfies the definition of "frivolous." It is completely without merit as it contains no arguments upon which the lower court's decision could be reversed. The arguments therein boil down to nothing more than "I don't like the decision below, so it should be reversed."

The support that Mr. Aguilera uses to re-litigate his case is documents that were not submitted at the time of the hearing. Mr. Aguilera has advanced no reasons why these documents are admissible on appeal. Mr. Aguilera may state that he was "unaware" that he could not introduce new evidence and use his pro se status as an excuse to avoid payment of attorney fees. However, the Utah State courts website, that is intended to help pro se litigations, clearly provides that "An appeal is not a new trial, and no new evidence will be accepted." Utah Courts - Appeals, www.utcourts.gov/howto/appeals/#prose.

Clearly, Mr. Aguilera feels personally slighted by the garnishment of his bank account as evidenced by his inflammatory statements about Ms. Bless' counsel in his appellate brief. This however, does not make an appeal meritorious. Mr. Aguilera's brief does not argue any specific error in the trial court's findings of fact except that the court did not interpret the facts in the same way that he does. Further, his brief does not set out any valid legal arguments under which this Court could reverse the lower court's findings and conclusions. Finally, Mr. Aguilera improperly relies on new evidence to support his claims and contentions. Thus, Mr. Aguilera's appeal is frivolous in that it is neither "grounded in fact" nor "warranted by existing law." Mr. Aguilera's appeal is also frivolous because it was taken with "no reasonable likelihood of prevailing," especially as he has failed to marshal any facts supporting the factual findings he

challenges, and his inability to support his allegations of the court's alleged abuse of discretion with anything more than his own unsupported opinion on "the proper application of garnishment exemptions. Finally, Mr. Aguilera's appeal is frivolous because it has clearly "result[ed] in . . . increased costs of litigation; and dissipation of the time and resources of the Law Court. Mr. Aguilera's appeal is similar to the other legal pleadings that he submitted to the trial court. The trial court previously found that his requests to the court were: "improperly brought;" not "made according to the rules of procedure;" "lacking in merit;" and "not in good faith." *See* Findings of Fact, Conclusions of Law, and Order.

Additionally, Utah Code Ann. § 30-3-3(2) provides that "In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense." In this matter, Ms. Bless was previously awarded her attorney fees and costs because she substantially prevailed on her claims and defenses to enforce the parties' stipulated custody order. Ms. Bless submitted the garnishment to collect those fees that she was previously awarded. The fees incurred in defending against Mr. Aguilera's appeal are to enforce the court judgment of attorney fees that arose from the previous custody litigation. As such, Ms. Bless' fees are tied

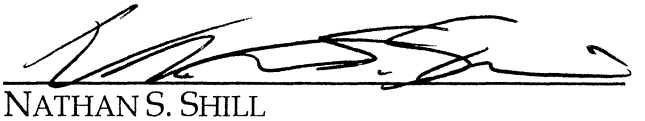
to the enforcement of a custody order and she is entitled to attorney fees if she substantially prevails. As discussed herein, Mr. Aguilera's appeal is frivolous and, as such, Ms. Bless should substantially prevail and should be awarded her attorney fees and costs.

For these reasons, this Court should award Ms. Bless both costs and attorney's fees in defending against this frivolous appeal.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's decision that the garnished funds were not exempt property and award attorney's fees and costs to Ms. Bless for having to defend against this frivolous appeal.

Respectfully submitted October 12 2010.



NATHAN S. SHILL
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on this 13 day of ~~August~~ October, 2010, I caused to be mailed, by deposit in the United States mail, two (2) true and correct copies and one (1) CD of the forgoing BRIEF OF APPELLEE to:

Luis A. Aguilera, pro se
8043 North Ridge Loop E. J6
Eagle Mountain, Utah 84005

Natalie Molino, Legal Assistant

ADDENDUM

Utah Code
Title 30 Husband and Wife
Chapter 3 Divorce
Section 3 Award of costs, attorney and witness fees -- Temporary alimony.

30-3-3. Award of costs, attorney and witness fees -- Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, Divorce, Chapter 4, Separate Maintenance, or Title 78B, Chapter 7, Part 1, Cohabitant Abuse Act, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

Amended by Chapter 3, 2008 General Session
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<< Previous Section (30-3-2) Next Section (30-3-4) >>

Utah Code
Title 78B Judicial Code
Chapter 5 Procedure and Evidence
Section 505 Property exempt from execution.

78B-5-505. Property exempt from execution.

(1) (a) An individual is entitled to exemption of the following property:

(i) a burial plot for the individual and the individual's family;

(ii) health aids reasonably necessary to enable the individual or a dependent to work or sustain health;

(iii) benefits the individual or the individual's dependent have received or are entitled to receive from any source because of:

(A) disability;

(B) illness; or

(C) unemployment;

(iv) benefits paid or payable for medical, surgical, or hospital care to the extent they are used by an individual or the individual's dependent to pay for that care;

(v) veterans benefits;

(vi) money or property received, and rights to receive money or property for child support;

(vii) money or property received, and rights to receive money or property for alimony or separate maintenance, to the extent reasonably necessary for the support of the individual and the individual's dependents;

(viii) (A) one:

(I) clothes washer and dryer;

(II) refrigerator;

(III) freezer;

(IV) stove;

(V) microwave oven; and

(VI) sewing machine;

(B) all carpets in use;

(C) provisions sufficient for 12 months actually provided for individual or family use;

(D) all wearing apparel of every individual and dependent, not including jewelry or furs; and

(E) all beds and bedding for every individual or dependent;

(ix) except for works of art held by the debtor as part of a trade or business, works of art:

(A) depicting the debtor or the debtor and his resident family; or

(B) produced by the debtor or the debtor and his resident family;

(x) proceeds of insurance, a judgment, or a settlement, or other rights accruing as a result of bodily injury of the individual or of the wrongful death or bodily injury of another individual of whom the individual was or is a dependent to the extent that those proceeds are compensatory;

(xi) the proceeds or benefits of any life insurance contracts or policies paid or payable to the debtor or any trust of which the debtor is a beneficiary upon the death of the spouse or children of the debtor, provided that the contract or policy has been owned by the debtor for a continuous unexpired period of one year;

(xii) the proceeds or benefits of any life insurance contracts or policies paid or payable to the spouse or

children of the debtor or any trust of which the spouse or children are beneficiaries upon the death of the debtor, provided that the contract or policy has been in existence for a continuous unexpired period of one year;

(xiii) proceeds and avails of any unmatured life insurance contracts owned by the debtor

or any revocable grantor trust created by the debtor, excluding any payments made on the contract during the one year immediately preceding a creditor's levy or execution;

(xiv) except as provided in Subsection (1)(b), any money or other assets held for or payable to the individual as a participant or beneficiary from or an interest of the individual as a participant or beneficiary in a retirement plan or arrangement that is described in Section 401(a), 401(h), 401(k), 403(a), 403(b), 408, 408A, 409, 414(d), or 414(e), Internal Revenue Code; and

(xv) the interest of or any money or other assets payable to an alternate payee under a qualified domestic relations order as those terms are defined in Section 414(p), Internal Revenue Code.

(b) The exemption granted by Subsection (1)(a)(xiv) does not apply to:

(i) an alternate payee under a qualified domestic relations order, as those terms are defined in Section 414(p), Internal Revenue Code; or

(ii) amounts contributed or benefits accrued by or on behalf of a debtor within one year before the debtor files for bankruptcy. This may not include amounts directly rolled over from other funds which are exempt from attachment under this section.

(2) The exemptions in Subsections (1)(a)(xi), (xii), and (xiii) do not apply to proceeds and avails of any matured or unmatured life insurance contract assigned or pledged as collateral for repayment of a loan or other legal obligation.

(3) Exemptions under this section do not limit items that may be claimed as exempt under Section **78B-5-506**.

Renumbered and Amended by Chapter 3, 2008 General Session
Download Code Section Zipped WordPerfect 78B05_050500.ZIP 3,757 Bytes

<< Previous Section (78B-5-504) Next Section (78B-5-506) >>

Rule 64. Writs in general.

(a) Definitions. As used in Rules 64, 64A, 64B, 64C, 64D, 64E, 69A, 69B and 69C:

(a)(1) "Claim" means a claim, counterclaim, cross claim, third party claim or any other claim.

(a)(2) "Defendant" means the party against whom a claim is filed or against whom judgment has been entered.

(a)(3) "Deliver" means actual delivery or to make the property available for pick up and give to the person entitled to delivery written notice of availability.

(a)(4) "Disposable earnings" means that part of earnings for a pay period remaining after the deduction of all amounts required by law to be withheld.

(a)(5) "Earnings" means compensation, however denominated, paid or payable to an individual for personal services, including periodic payments pursuant to a pension or retirement program. Earnings accrue on the last day of the period in which they were earned.

(a)(6) "Notice of exemptions" means a form that advises the defendant or a third person that certain property is or may be exempt from seizure under state or federal law. The notice shall list examples of exempt property and indicate that other exemptions may be available. The notice shall instruct the defendant of the deadline for filing a reply and request for hearing.

(a)(7) "Officer" means any person designated by the court to whom the writ is issued, including a sheriff, constable, deputy thereof or any person appointed by the officer to hold the property.

(a)(8) "Plaintiff" means the party filing a claim or in whose favor judgment has been entered.

(a)(9) "Property" means the defendant's property of any type not exempt from seizure. Property includes but is not limited to real and personal property, tangible and intangible property, the right to property whether due or to become due, and an obligation of a third person to perform for the defendant.

(a)(10) "Serve" with respect to parties means any method of service authorized by Rule 5 and with respect to non-parties means any manner of service authorized by Rule 4.

(b) Security.

(b)(1) Amount. When security is required of a party, the party shall provide security in the sum and form the court deems adequate. For security by the plaintiff the amount should be sufficient to reimburse other parties for damages, costs and attorney fees incurred as a result of a writ wrongfully obtained. For security by the defendant, the amount should be equivalent to the amount of the claim or judgment or the value of the defendant's interest in the property. In fixing the amount, the court may consider any relevant factor. The court may relieve a party from the necessity of providing security if it appears that none of the parties will incur damages, costs or attorney fees as a result of a writ wrongfully obtained or if there exists some other substantial reason for dispensing with security. The amount of security does not establish or limit the amount of damages, costs or attorney fees recoverable if the writ is wrongfully obtained.

(b)(2) Jurisdiction over surety. A surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom papers affecting the surety's liability may be served. The surety shall file with the clerk of the court the address to which the clerk may mail papers. The surety's liability may be enforced on motion without the necessity of an independent action. If the opposing party recovers judgment or if the writ is wrongfully obtained, the surety will pay the judgment, damages, costs and attorney fees not to exceed the sum specified in the contract. The surety is responsible for return of property ordered returned.

(b)(3) Objection. The court may issue additional writs upon the original security subject to the objection of the opposing party. The opposing party may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the writ. The burden to show the sufficiency of the security and the sufficiency of the sureties is on the proponent of the security.

(b)(4) Security of governmental entity. No security is required of the United States, the State of Utah, or an officer, agency, or subdivision of either, nor when prohibited by law.

(c) Procedures in aid of writs.

(c)(1) Referee. The court may appoint a referee to monitor hearings under this subsection.

(c)(2) Hearing; witnesses; discovery. The court may conduct hearings as necessary to identify property and to apply the property toward the satisfaction of the judgment or order. Witnesses may be subpoenaed to appear, testify and produce records. The court may permit discovery.

(c)(3) Restraint. The court may forbid any person from transferring, disposing or interfering with the property.

(d) Issuance of writ; service

(d)(1) Clerk to issue writs. The clerk of the court shall issue writs. A court in which a transcript or abstract of a judgment or order has been filed has the same authority to issue a writ as the court that entered the judgment or order. If the writ directs the seizure of real property, the clerk of the court shall issue the writ to the sheriff of the county in which the real property is located. If the writ directs the seizure of personal property, the clerk of the court may issue the writ to an officer of any county.

(d)(2) Content. The writ may direct the officer to seize the property, to keep the property safe, to deliver the property to the plaintiff, to sell the property, or to take other specified actions. If the writ is to enforce a judgment or order for the payment of money, the writ shall specify the amount ordered to be paid and the amount due.

(d)(2)(A) If the writ is issued ex parte before judgment, the clerk shall attach to the writ plaintiff's affidavit, detailed description of the property, notice of hearing, order authorizing the writ, notice of exemptions and reply form.

(d)(2)(B) If the writ is issued before judgment but after a hearing, the clerk shall attach to the writ plaintiff's affidavit and detailed description of the property.

(d)(2)(C) If the writ is issued after judgment, the clerk shall attach to the writ plaintiff's application, detailed description of the property, the judgment, notice of exemptions and reply form.

(d)(3) Service.

(d)(3)(A) Upon whom; effective date. The officer shall serve the writ and accompanying papers on the defendant, and, as applicable, the garnishee and any person named by the plaintiff as claiming an interest in the property. The officer may simultaneously serve notice of the date, time and place of sale. A writ is effective upon service.

(d)(3)(B) Limits on writs of garnishment.

(d)(3)(B)(i) A writ of garnishment served while a previous writ of garnishment is in effect is effective upon expiration of the previous writ; otherwise, a writ of garnishment is effective upon service.

(d)(3)(B)(ii) Only one writ of garnishment of earnings may be in effect at one time. One additional writ of garnishment of earnings for a subsequent pay period may be served on the garnishee while an earlier writ of continuing garnishment is in effect.

(d)(3)(C) Return; inventory. Within 10 days after service, the officer shall return the writ to the court with proof of service. If property has been seized, the officer shall include an inventory of the property and whether the property is held by the officer or the officer's designee. If a person refuses to give the officer an affidavit describing the property, the officer shall indicate the fact of refusal on the return, and the court may require that person to pay the costs of any proceeding taken for the purpose of obtaining such information.

(d)(3)(D) Service of writ by publication. The court may order service of a writ by publication upon a person entitled to notice in circumstances in which service by publication of a summons and complaint would be appropriate under Rule 4.

(d)(3)(D)(i) If service of a writ is by publication, substantially the following shall be published under the caption of the case:

To _____, [Defendant/Garnishee/Claimant]:

A writ of _____ has been issued in the above-captioned case commanding the officer of _____ County as follows:

[Quoting body of writ]

Your rights may be adversely affected by these proceedings. Property in which you have an interest may be seized to pay a judgment or order. You have the right to claim property exempt from seizure under statutes of the United States or this state, including Utah Code, Title 78B, Chapter 5, Part 5.

(d)(3)(D)(ii) The notice shall be published in a newspaper of general circulation in each county in which the property is located at least 10 days prior to the due date for the reply or at least 10 days prior to the date of any sale, or as the court orders. The date of publication is the date of service.

(e) Claim to property by third person.

(e)(1) Claimant's rights. Any person claiming an interest in the property has the same rights and obligations as the defendant with respect to the writ and with respect to providing and objecting to security. Any claimant named by the plaintiff and served with the writ and accompanying papers shall exercise those rights and obligations within the same time allowed the defendant. Any claimant not named by the plaintiff and not served with the writ and accompanying papers may exercise those rights and obligations at any time before the property is sold or delivered to the plaintiff.

(e)(2) Join claimant as defendant. The court may order any named claimant joined as a defendant in interpleader. The plaintiff shall serve the order on the claimant. The claimant is thereafter a defendant to the action and shall answer within 10 days, setting forth any claim or defense. The court may enter judgment for or against the claimant to the limit of the claimant's interest in the property.

(e)(3) Plaintiff's security. If the plaintiff requests that an officer seize or sell property claimed by a person other than the defendant, the officer may request that the court require the plaintiff to file security.

(f) Discharge of writ; release of property.

(f)(1) By defendant. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file security and a motion to discharge the writ. The plaintiff may object to the sufficiency of the security or the sufficiency of the sureties within five days after service of the motion. At any time before notice of sale of the property or before the property is delivered to the plaintiff, the defendant may file a motion to discharge the writ on the ground that the writ was wrongfully obtained. The court shall give the plaintiff reasonable opportunity to correct a defect. The defendant shall serve the order to discharge the writ upon the officer, plaintiff, garnishee and any third person claiming an interest in the property.

(f)(2) By plaintiff. The plaintiff may discharge the writ by filing a release and serving it upon the officer, defendant, garnishee and any third person claiming an interest in the property.

(f)(3) Disposition of property. If the writ is discharged, the court shall order any remaining property and proceeds of sales delivered to the defendant.

(f)(4) Copy filed with county recorder. If an order discharges a writ upon property seized by filing with the county recorder, the officer or a party shall file a certified copy of the order with the county recorder.

(f)(5) Service on officer; disposition of property. If the order discharging the writ is served on the officer:

(f)(5)(A) before the writ is served, the officer shall return the writ to the court;

(f)(5)(B) while the property is in the officer's custody, the officer shall return the property to the defendant; or

(f)(5)(C) after the property is sold, the officer shall deliver any remaining proceeds of the sale to the defendant.

Rule 64D. Writ of garnishment.

(a) Availability. A writ of garnishment is available to seize property of the defendant in the possession or under the control of a person other than the defendant. A writ of garnishment is available after final judgment or after the claim has been filed and prior to judgment. The maximum portion of disposable earnings of an individual subject to seizure is the lesser of:

(a)(1) 50% of the defendant's disposable earnings for a writ to enforce payment of a judgment for failure to support dependent children or 25% of the defendant's disposable earnings for any other judgment; or

(a)(2) the amount by which the defendant's disposable earnings for a pay period exceeds the number of weeks in that pay period multiplied by thirty times the federal minimum hourly wage prescribed by the Fair Labor Standards Act in effect at the time the earnings are payable.

(b) Grounds for writ before judgment. In addition to the grounds required in Rule 64A, the grounds for a writ of garnishment before judgment require all of the following:

(b)(1) that the defendant is indebted to the plaintiff;

(b)(2) that the action is upon a contract or is against a defendant who is not a resident of this state or is against a foreign corporation not qualified to do business in this state;

(b)(3) that payment of the claim has not been secured by a lien upon property in this state;

(b)(4) that the garnishee possesses or controls property of the defendant; and

(b)(5) that the plaintiff has attached the garnishee fee established by Utah Code Section 78A-2-216.

(c) Statement. The application for a post-judgment writ of garnishment shall state:

(c)(1) if known, the nature, location, account number and estimated value of the property and the name, address and phone number of the person holding the property;

(c)(2) whether any of the property consists of earnings;

(c)(3) the amount of the judgment and the amount due on the judgment;

(c)(4) the name, address and phone number of any person known to the plaintiff to claim an interest in the property; and

(c)(5) that the plaintiff has attached or will serve the garnishee fee established by Utah Code Section 78A-2-216.

(d) Defendant identification. The plaintiff shall submit with the affidavit or application a copy of the judgment information statement described in Utah Code Section 78B-5-201 or the defendant's name and address and, if known, the last four digits of the defendant's social security number and driver license number and state of issuance.

(e) Interrogatories. The plaintiff shall submit with the affidavit or application interrogatories to the garnishee inquiring:

(e)(1) whether the garnishee is indebted to the defendant and the nature of the indebtedness;

(e)(2) whether the garnishee possesses or controls any property of the defendant and, if so, the nature, location and estimated value of the property;

(e)(3) whether the garnishee knows of any property of the defendant in the possession or under

the control of another, and, if so, the nature, location and estimated value of the property and the name, address and phone number of the person with possession or control;

(e)(4) whether the garnishee is deducting a liquidated amount in satisfaction of a claim against the plaintiff or the defendant, a designation as to whom the claim relates, and the amount deducted;

(e)(5) the date and manner of the garnishee's service of papers upon the defendant and any third persons;

(e)(6) the dates on which previously served writs of continuing garnishment were served; and

(e)(7) any other relevant information plaintiff may desire, including the defendant's position, rate and method of compensation, pay period, and the computation of the amount of defendant's disposable earnings.

(f) Content of writ; priority. The writ shall instruct the garnishee to complete the steps in subsection (g) and instruct the garnishee how to deliver the property. Several writs may be issued at the same time so long as only one garnishee is named in a writ. Priority among writs of garnishment is in order of service. A writ of garnishment of earnings applies to the earnings accruing during the pay period in which the writ is effective.

(g) Garnishee's responsibilities. The writ shall direct the garnishee to complete the following within seven business days of service of the writ upon the garnishee:

(g)(1) answer the interrogatories under oath or affirmation;

(g)(2) serve the answers on the plaintiff; and

(g)(3) serve the writ, answers, notice of exemptions and two copies of the reply form upon the defendant and any other person shown by the records of the garnishee to have an interest in the property.

The garnishee may amend answers to interrogatories to correct errors or to reflect a change in circumstances by serving the amended answers in the same manner as the original answers.

(h) Reply to answers; request for hearing.

(h)(1) The plaintiff or defendant may file and serve upon the garnishee a reply to the answers, a copy of the garnishee's answers, and a request for a hearing. The reply shall be filed and served within 10 days after service of the answers or amended answers, but the court may deem the reply timely if filed before notice of sale of the property or before the property is delivered to the plaintiff. The reply may:

(h)(1)(A) challenge the issuance of the writ;

(h)(1)(B) challenge the accuracy of the answers;

(h)(1)(C) claim the property or a portion of the property is exempt; or

(h)(1)(D) claim a set off.

(h)(2) The reply is deemed denied, and the court shall conduct an evidentiary hearing as soon as possible and not to exceed 14 days.

(h)(3) If a person served by the garnishee fails to reply, as to that person:

(h)(3)(A) the garnishee's answers are deemed correct; and

(h)(3)(B) the property is not exempt, except as reflected in the answers.

(i) Delivery of property. A garnishee shall not deliver property until the property is due the defendant. Unless otherwise directed in the writ, the garnishee shall retain the property until 20 days after service by the garnishee under subsection (g). If the garnishee is served with a reply within that time, the garnishee shall retain the property and comply with the order of the court entered after the hearing on the reply. Otherwise, the garnishee shall deliver the property as provided in the writ.

(j) Liability of garnishee.

(j)(1) A garnishee who acts in accordance with this rule, the writ or an order of the court is released from liability, unless answers to interrogatories are successfully controverted.

(j)(2) If the garnishee fails to comply with this rule, the writ or an order of the court, the court may order the garnishee to appear and show cause why the garnishee should not be ordered to pay such amounts as are just, including the value of the property or the balance of the judgment, whichever is less, and reasonable costs and attorney fees incurred by parties as a result of the garnishee's failure. If the garnishee shows that the steps taken to secure the property were reasonable, the court may excuse the garnishee's liability in whole or in part.

(j)(3) No person is liable as garnishee by reason of having drawn, accepted, made or endorsed any negotiable instrument that is not in the possession or control of the garnishee at the time of service of the writ.

(j)(4) Any person indebted to the defendant may pay to the officer the amount of the debt or so much as is necessary to satisfy the writ, and the officer's receipt discharges the debtor for the amount paid.

(j)(5) A garnishee may deduct from the property any liquidated claim against the plaintiff or defendant.

(k) Property as security.

(k)(1) If property secures payment of a debt to the garnishee, the property need not be applied at that time but the writ remains in effect, and the property remains subject to being applied upon payment of the debt. If property secures payment of a debt to the garnishee, the plaintiff may obtain an order authorizing the plaintiff to buy the debt and requiring the garnishee to deliver the property.

(k)(2) If property secures an obligation that does not require the personal performance of the defendant and that can be performed by a third person, the plaintiff may obtain an order authorizing the plaintiff or a third person to perform the obligation and requiring the garnishee to deliver the property upon completion of performance or upon tender of performance that is refused.

(l) Writ of continuing garnishment.

(l)(1) After final judgment, the plaintiff may obtain a writ of continuing garnishment against any non exempt periodic payment. All provisions of this rule apply to this subsection, but this subsection governs over a contrary provision.

(l)(2) A writ of continuing garnishment applies to payments to the defendant from the effective date of the writ until the earlier of the following:

(l)(2)(A) 120 days;

(l)(2)(B) the last periodic payment;

(l)(2)(C) the judgment is stayed, vacated or satisfied in full; or

(l)(2)(D) the writ is discharged.

(l)(3) Within seven days after the end of each payment period, the garnishee shall with respect to that period:

(l)(3)(A) answer the interrogatories under oath or affirmation;

(l)(3)(B) serve the answers to the interrogatories on the plaintiff, the defendant and any other person shown by the records of the garnishee to have an interest in the property;

(l)(3)(C) file the answers to the interrogatories with the clerk of the court; and

(l)(3)(D) deliver the property as provided in the writ.

(l)(4) Any person served by the garnishee may reply as in subsection (g), but whether to grant a hearing is within the judge's discretion.

(l)(5) A writ of continuing garnishment issued in favor of the Office of Recovery Services or the Department of Workforce Services of the state of Utah to recover overpayments:

(l)(5)(A) is not limited to 120 days;

(l)(5)(B) has priority over other writs of continuing garnishment; and

(l)(5)(C) if served during the term of another writ of continuing garnishment, tolls that term and preserves all priorities until the expiration of the state's writ.

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references. (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief

unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person,' "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions

of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-

Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with

accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Notes

Rule 24(a)(9) now reflects what Utah appellate courts have long held. See In re Beesley, 883 P.2d 1343, 1349 (Utah 1994); Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc., 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original)(quoting West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991)). See also State ex rel. M.S. v. Salata, 806 P.2d 1216, 1218 (Utah App. 1991); Bell v. Elder, 782 P.2d 545, 547 (Utah App. 1989); State v. Moore, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Advisory Committee Notes

Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages -- single or double costs or attorney fees or both -- is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by Anders v. California, 386 US 738 (1967) and State v. Clayton, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.